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2 UNITED STATES DISTRICT COURT

3 DISTRICT OF OREGON

4 PORTLAND DIVISION

5 TAMMY GRAHAM, )

6 Plaintiff, )

No. 03:13-cv-01962-HU

7 vs. )

8 FOREVER YOUNG OREGON, LLC, )  
an Oregon corporation; )  
9 RONALD ZEMP; and JENNIFER )  
ZEMP; )

FINDINGS & RECOMMENDATIONS ON  
MOTION FOR DEFAULT JUDGMENT,  
AND MOTION FOR ATTORNEY FEES AND  
LITIGATION COSTS

10 Defendants. )  
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13  
14 Eric J. Fjelstad  
Smith & Fjelstad  
15 722 N. Main Avenue  
Gresham, OR 97030

16 Attorney for Plaintiff  
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20 HUBEL, Magistrate Judge:

21 On November 5, 2013, the plaintiff filed this case against the  
22 defendants, alleging failure to pay straight time and mandatory  
23 overtime wages, in violation of the federal Fair Labor Standards  
24 Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), and Oregon wage-and-hour  
25 laws, specifically ORS § 652.140 *et seq.*, and ORS § 653.261. Dkt.  
26 #1.

27 On January 10, 2014, a Summons was issued to the Registered  
28 Agent for the corporate defendant Forever Young Oregon, LLC. Dkt.

1 - FINDINGS AND RECOMMENDATIONS

1 #4. On March 18, 2014, an Affidavit of Service was filed showing  
2 that on January 16, 2014, a process server served a copy of the  
3 summons, Complaint, and Civil Case Management Order on the recep-  
4 tionist for Forever Young's registered agent. In the Affidavit of  
5 Service, the process server indicates the receptionist was  
6 "authorized to accept service on behalf of the registered agent."  
7 Dkt. #10. When Forever Young failed to move or plead in response  
8 to the Complaint, on March 13, 2014, the plaintiff filed an ex  
9 parte motion for entry of default against Forever Young. At a  
10 status conference on April 9, 2014, the Court orally granted the  
11 motion for entry of default against Forever Young, see Dkt. #16,  
12 and on April 10, 2014, a paper Order of Default was entered to  
13 memorialize the Court's ruling. Dkt. #16.

14 On April 10, 2014, Summonses were issued to the individual  
15 defendants Ronald Zemp and Jennifer Zemp. Dkt. #15. Service was  
16 accomplished, and default ultimately was entered against both  
17 individual defendants on July 14, 2014. Dkt. ##21-24, 26.

18 The case currently is before the court on the plaintiff's  
19 motion for default judgment against the corporate defendant only.\*  
20 Dkt. #17. The plaintiff also has filed a motion for attorney's  
21 fees and costs. Dkt. #19. The undersigned submits the following  
22 report and recommended disposition of the motions pursuant to 28  
23 U.S.C. § 636(b)(1)(B).

24  
25  
26 \*Graham claims that if her collection efforts against Forever  
27 Young are successful, then "the individual defendants will not be  
28 responsible for paying the judgment," and therefore, at this time,  
she seeks default judgment only against the corporate defendant.  
Dkt. #17, p.2.

2 - FINDINGS AND RECOMMENDATIONS

1                                   **I.   MOTION FOR DEFAULT JUDGMENT**

2           Graham alleges Forever Young failed to pay her straight time  
3 and overtime wages as required by law, and she also seeks penalty  
4 wages under Oregon law. Because Graham's damages cannot be calcu-  
5 lated by simple computation, without reference to other evidence,  
6 the court considers Graham's motion for default judgment pursuant  
7 to Federal Rule of Civil Procedure 55(b)(2). See, e.g., *Franchise*  
8 *Holdings II, LLC v. Huntington Restaurants Group, Inc.*, 375 F.3d  
9 922, 928-29 (9th Cir. 2004) (citation omitted).

10          Graham's attorney Eric J. Fjelstad has submitted declarations  
11 setting forth the step-by-step process he employed to determine the  
12 amounts of Graham's unpaid wages under Oregon law, liquidated  
13 damages under the FLSA, and statutory penalties under Oregon law.  
14 Mr. Fjelstad indicates he made these calculations from detailed  
15 records of Graham's work schedules and pay stubs for each pay  
16 period. See Dkt. ## 18 & 27.

17          Graham's First Claim for Relief seeks unpaid overtime wages  
18 under the FLSA, which requires payment of at least time-and-a-half  
19 for all hours in excess of forty during a work week. 29 U.S.C.  
20 § 207(a)(1). Mr. Fjelstad calculates Graham is owed **\$27,964.03** in  
21 unpaid overtime wages. Dkt. #17, p. 2; Dkt. #27, p. 3. Further,  
22 an employer who fails to pay wages due under the Act is liable not  
23 only for the amount of the unpaid wages, but also "an additional  
24 equal amount as liquidated damages." 29 U.S.C. § 216(b). Thus,  
25 Graham claims she is entitled to recover **\$27,964.03** in FLSA  
26 liquidated damages. *Id.* The court finds Mr. Fjelstad's calcula-  
27 tions are reasonable and accurate, and Graham should be awarded  
28 FLSA damages as requested.

1       Graham's Second Claim for Relief seeks penalty wages under ORS  
2 §§ 653.055(1)(b) and 652.150(2), because Forever Young failed to  
3 pay Graham's wages for her final pay period. ORS § 653.055(1)(b)  
4 specifies that the civil penalty is calculated as "provided in ORS  
5 652.150." ORS § 652.150 provides that an employer who "willfully  
6 fails" to make timely payment of all wages due when an employee's  
7 employment ceases, as required by ORS § 652.140, is subject to a  
8 penalty equal to the employee's wage rate times eight hours per day  
9 for the number of days the wages remain unpaid, up to a maximum of  
10 thirty days. The "willful" requirement in the statute does not  
11 contain a malice component; "it merely indicates that the act or  
12 omission was purposeful and not the product of inadvertence."  
13 *Young v. Oregon*, 340 Or. 401, 409, 133 P.3d 915, 919 (2006). The  
14 evidence in the present case indicates Forever Young's failure to  
15 pay Graham's final wages was not the product of inadvertence.  
16 Graham's counsel sent Forever Young two letters requesting payment  
17 of Graham's unpaid wages, but the company still failed to pay the  
18 wages Graham was due. See Dkt. #1, ¶¶ 20 & 21; Dkt. #17, p. 3;  
19 Dkt. #18, ¶5; Dkt. #27, p. 3. The court finds Forever Young  
20 "willfully" failed to pay Graham's wages upon termination as  
21 required by ORS § 652.140. Because Graham's final wages remained  
22 unpaid for longer than thirty days, her statutory penalty is  
23 limited to thirty days of work (240 hours) times Graham's last  
24 hourly rate of \$16.15 per hour; i.e., \$3,876.00. See Dkt. #27, p.  
25 3. The court finds Graham is entitled to a penalty under Oregon  
26 law in the amount of **\$3,876.00**, for Forever Young's willful failure  
27 to pay the wages Graham was due when she ceased her employment.

1       Graham also is entitled to recover post-judgment interest at  
2 a rate equal to "the weekly average 1-year constant maturity  
3 Treasury yield, as published by the Board of Governors of the  
4 Federal Reserve System, for the calendar week preceding." 28  
5 U.S.C. § 1961(a). Graham indicates the applicable rate for the  
6 week prior to the filing of her motion for default judgment (i.e.,  
7 the week ending April 11, 2014) was 0.10%. Dkt. #17, p. 3. The  
8 court's judgment should provide for interest from the date of  
9 judgment at **0.10% per annum**.

## 10 11                   **II. MOTION FOR ATTORNEY FEES AND COSTS**

12       Graham moves for attorney fees in the amount of \$5,570.92 for  
13 18.57 hours of attorney time, and costs of \$470.00 (consisting of  
14 the filing fee and service fees). Dkt. #20.

15       Graham is entitled to recover reasonable attorney fees and  
16 litigation costs from Forever Young under both federal and state  
17 law. See 29 U.S.C. § 216(b); ORS § 653.055(4). Indeed, an award  
18 of attorney fees under the FLSA is mandatory. 29 U.S.C. § 216(b).  
19 In considering the amount of fees to be awarded in cases where  
20 Congress has authorized attorney fees to a prevailing party, the  
21 court considers the factors enumerated in *Hensley v. Eckerhart*, 461  
22 U.S. 424, 433 n.7, 103 S. Ct. 1933, 1939 n.7, 76 L. Ed. 2d 40  
23 (1983). The *Hensley* Court suggested that, a minimum, the court  
24 should consider (1) "the number of hours reasonably expended on the  
25 litigation multiplied by a reasonable hourly rate"; (2) the results  
26 obtained; and (3) "the relationship between the extent of success  
27 and the amount of the fee award." *Id.*, 461 U.S. at 433-38, 103  
28 S. Ct. at 1939-42.

Other factors may be considered, as well, as the court exercises its discretion in determining the amount of fees to be awarded. See *Hensley*, 461 U.S. at 434 n.9, 103 S. Ct. at 1940 n.9. In the Ninth Circuit, courts reaching attorneys' fee decisions are directed to consider "some or all of the twelve relevant criteria set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975)[.]" *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988). In *Kerr*, the Ninth Circuit adopted twelve factors listed by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The twelve *Johnson-Kerr* factors include:

(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

*Kerr*, 526 F.2d at 70. The court noted these twelve factors are "consistent with those recommended by the Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 2-106." *Id.* The *Johnson-Kerr* factors are similar to those the Oregon legislature has directed courts to consider in determining whether to award attorneys' fees, and if so, in what amount. See ORS § 20.075.

In the present case, Mr. Fjelstad spent 18.57 hours representing Graham. See Dkt. #20, p. 4. The court has reviewed Mr. Fjelstad's description of how his time was expended in the

1 case, and finds the amount of time expended was reasonable.  
2 Mr. Fjelstad acknowledges that the issues in this case were neither  
3 novel, nor difficult, and accepting the case did not preclude him  
4 from taking other cases. Dkt. #19, pp. 3, 4. Nevertheless, an  
5 understanding of the relevant law, and an ability to analyze the  
6 plaintiff's employment records and pursue appropriate claims,  
7 required a certain amount of skill. Mr. Fjelstad has represented  
8 clients in employment-related actions for many years, and claims "a  
9 solid reputation in the Portland legal community, particularly in  
10 the employment law legal community." *Id.*, p. 5. The undersigned  
11 is familiar with Mr. Fjelstad, and finds that his experience, repu-  
12 tation, and ability weigh in Graham's favor on the issue of  
13 attorney's fees.

14 The amount involved and the results obtained are somewhat  
15 neutral in this case, where Forever Young failed to appear or  
16 defend. However, Graham's combined damages and penalties exceed  
17 \$59,800, representing a significant judgment in her favor.

18 Regarding the "customary fee" for counsel's services,  
19 Mr. Fjelstad argues the requested rate of \$300 per hour is "con-  
20 sistent with the rates charged by similarly experienced attorneys  
21 in the greater Portland market." *Id.* He cites the Oregon State  
22 Bar 2012 Economic Survey, which indicates the \$300 per hour  
23 requested rate "is at the low end of the normal \$300-\$400 per hour  
24 rate of similarly experienced attorneys representing plaintiffs in  
25 the field of employment litigation." *Id.* The court finds the \$300  
26 per hour rate is reasonable and customary.

27 The court also is guided by the factors enumerated in ORS  
28 § 20.075. In particular, the court's finding, above, that Forever



1 Young's conduct leading to this action was willful weighs heavily  
 2 in Graham's favor on the issue of attorney fees. Further, the fact  
 3 that Forever Young chose not to defend at any stage of the  
 4 litigation weighs in Graham's favor. See ORS § 20.075(1) (a) &  
 5 (b). In addition, awarding a reasonable attorney's fee in this  
 6 case will not "deter others from asserting good faith claims or  
 7 defenses in similar cases." ORS § 20.075(a)(c).

8 In short, considering all relevant factors, the court finds  
 9 Graham's motion for attorney fees should be granted, and she should  
 10 be awarded fees in the amount of **\$5,570.92**. The court further  
 11 finds that as the prevailing party, Graham is entitled to recover  
 12 her litigation costs in the amount of **\$470.00**.

### 13 14 **III. CONCLUSION**

15 The undersigned recommends Graham's motion for default  
 16 judgment be **granted**, and that she be awarded unpaid overtime wages  
 17 of **\$27,964.03**, FLSA liquidated damages of **\$27,964.03**, and an Oregon  
 18 statutory penalty of **\$3,876.00**, for total damages in the amount of  
 19 **\$59,804.06**, with interest from the date of judgment at the rate of  
 20 **0.10% per annum**.

21 The undersigned further recommends Graham's motion for  
 22 attorney fees and costs be **granted**., and that she be awarded  
 23 attorney fees in the amount of **\$5,570.92**, and costs in the amount  
 24 of **\$470.00**.

### 25 26 **IV. SCHEDULING ORDER**

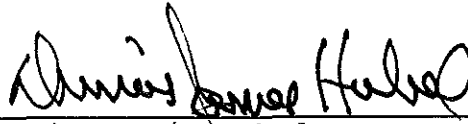
27 These Findings and Recommendations will be referred to a district  
 28 judge. Objections, if any, are due by **September 5, 2014**. If no



1 objections are filed, then the Findings and Recommendations will go  
2 under advisement on that date. If objections are filed, then any  
3 response is due by **September 23, 2014**. By the earlier of the  
4 response due date or the date a response is filed, the Findings and  
5 Recommendations will go under advisement.

6 IT IS SO ORDERED.

7 Dated this 19th day of August, 2014.

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11 Dennis James Hubel  
12 United States Magistrate Judge  
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